



Arizona Prosecuting Attorneys' Advisory Council

Appellate Autopsy of a Capital Case

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OBJECTIVE:

- To detail what happens to a capital case after conviction.
- To discuss issues that affect whether a case will be affirmed/reversed on appeal and in post-conviction proceedings.
- To provide a primer and update of prosecutions and public record requests.

OVERVIEW:

- After Conviction: Direct Appeal, Post-conviction proceedings, federal habeas.
- Pre-trial and trial tips that may affect the case post-conviction.
- Public record requests.
- Questions.

Direct Appeal

- Arizona Rule of Criminal Procedure 31.2(b)-automatic appeal to the Arizona Supreme Court when the defendant has been sentenced to death.
 - The defendant cannot waive this appeal.
- On direct appeal the defendant may *only* raise record based claims.
- There is always oral argument on capital cases on direct appeal.
- After the case is decided on appeal the defendant may directly petition the United States Supreme Court for certiorari.
- The conviction is 2-3 years old at this point.

Post-Conviction Relief (“PCR”) Proceedings

- After completion of the direct appeal and/or the petition for certiorari, the Arizona Supreme Court files a PCR notice on the defendant's behalf (Rule 32).
- Arizona Rule of Criminal Procedure 32.4(c)(1) provides 12 months from the date of appointment for counsel to file a PCR petition.
- The defendant can raise non-record based claims, as set forth in Rule 32.1.
- The most common claim raised in PCR is ineffective assistance of counsel (“IAC”) claims.

PCR – IAC Claims – *Strickland*

- IAC claims are reviewed under *Strickland v. Washington* (U.S. 1984).
- Under *Strickland* the defendant must show:
 - (1) that his attorney's performance was deficient and
 - (2) that he was prejudiced as a result.

IAC Claims – Strickland

- Under *Strickland*, judicial scrutiny of counsel's performance is highly deferential. *Wong v. Belmontes* (U.S. 2009).
- Prejudice – a defendant must show a reasonable probability of a different result – not enough to show “conceivable effect” on outcome. *Harrington v. Richter* (U.S. 2011).

PCR proceedings-continued

- The trial court (the same trial judge, if still on the bench) reviews the PCR petition. The court first determines what claims are precluded under Rule 32.2(a) and then determines what, if any, claims are colorable. The judge may grant a hearing on any colorable claims.
- After the PCR petition is denied or granted, the losing party may petition for review by the Arizona Supreme Court.
- After the case is decided on review the defendant may (but usually does not) directly petition the United States Supreme Court for certiorari.
- The conviction is 6-9 years old at this point.

Federal habeas

- Case is final after conclusion of direct appeal and 1-year statute of limitations begins, but filing time is tolled while PCR proceeding is pending.
- Once the Arizona Supreme Court denies the petition for review in the PCR proceeding, the limitations period is no longer tolled.
- The defendant then has one year to file a petition for writ of habeas corpus in federal district court.
- The case is reviewed by one district court judge.
- The conviction is 5-10 years old at this point.

AEDPA (1996): Changed Habeas Law

- Establishes a 1-year statute of limitations for filing federal habeas petition (6 months for capital cases in opt-in states).
- Authorizes federal judges to deny on the merits any claim that a petitioner failed to exhaust in state court;
- Prohibits a federal court from holding an evidentiary hearing when the petitioner failed to develop the facts in state court, except in limited circumstances;
- Bars successive petitions, except in limited circumstances; and
- Mandates a new standard of review for evaluating state court determinations of fact and applications of constitutional law.

Federal Habeas Concepts

- **Exhaustion:** Must first exhaust federal claim in state court. Must fairly present operative facts and legal principles.
- **Procedural Default:** If a claim has not been exhausted, it is defaulted if the defendant cannot go back to state court to exhaust it.
 - ***** Exception: *Martinez v. Ryan* (U.S. 2012) *****
- **Deference:** Section 2254(d) provides highly deferential standard ... state court decisions must be given the benefit of the doubt. State proceedings are central process, not just preliminary step for later federal habeas proceeding. *Harrington v. Richter* (U.S. 2011).

28 U.S.C. Section 2254(d)

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IAC Claims – Double Deference

- Pivotal question in federal habeas is whether state court's application of *Strickland* standard was unreasonable. *Harrington v. Richter* (U.S. 2011).
- A "doubly deferential judicial review" applies to a *Strickland* claim evaluated under the Section 2254(d)(1) standard. *Knowles v. Mirzayance* (U.S. 2009).
- Double deference = both state court and defense attorney get the benefit of the doubt. *Burt v. Titlow* (U.S. 2013).

IAC CASES

- *Woods v. Donald*, 135 S.Ct. 1372 (2015)
- *Hinton v. Alabama*, 134 S.Ct. 1081 (2014)
- *Harrington v. Richter*, 131 S.Ct. 770 (2011)
- *Cullen v. Pinholster*, 563 U.S. 170 (2011)
- *Rompilla v. Beard*, 545 U.S. 374 (2005)
- *Wiggins v. Smith*, 539 U.S. 510 (2003)

Martinez v. Ryan

- Ineffective assistance of post-conviction counsel as cause to excuse procedural default.
- If there is not a mechanism in state court to address ineffective assistance of post-conviction counsel, the federal courts review the claim, without any deference to a (non-existent) state court decision.

Federal habeas-Ninth Circuit Court of Appeals

- If the district court denies relief on the habeas petition, the defendant may appeal the "certified" issues to the Ninth Circuit Court of Appeals.
- The defendant may also brief non-certified issues on appeal, although the Ninth Circuit does not have to consider those claims.
- The case is reviewed by a 3-judge panel.
- After the Ninth Circuit issues a decision, the losing party may petition for a rehearing *en banc*, which is 11 judges.
- The losing party may then petition the United States Supreme Court for certiorari.
- The conviction is 15-20 years old at this point.
- Litigation over method of execution

PRESERVING YOUR RECORD AND PROTECTING YOUR CONVICTION

TIPS TO IMPROVE YOUR CHANCES OF AFFIRMANCE ON APPEAL AND DENIAL IN PCR AND FEDERAL HABEAS

- Making a Record
- Recent issues
- Disclosure
- Preclusion
- Admissibility
- The Defense

MAKING A RECORD

If it's not in the record—it does not count on appeal.

- The record on direct appeal automatically includes, under Arizona Rule of Criminal Procedure 31.8:
 - Certified transcripts of the proceedings—in a death penalty case, all recorded proceedings are transcribed under Rule 31.8(b)(3) (not so in non-capital cases, see Ariz. R. Evid. 31.8(b)(2)).
 - All "documents, papers, books and photographs introduced into evidence" (note—not other types of exhibits (e.g., weapons, bulky items, etc.)).
 - All pleadings and documents in the file (motions, minute entries, etc.).
 - Electronic recordings of the proceeding, if they exist and if authorized by the appellate court.
- Either party can add to or delete from the record on appeal within the timelines set forth under Rule 31.8(a)(2).
- Rule 32 proceedings at the trial court level are not record-based.
- Appeal in capital cases is to the Arizona Supreme Court through a petition for review, see Ariz. R. Crim. P. 32.8(c).
- The record on petition for review is not generated automatically in capital cases; see Ariz. R. Crim. P. 32.8(c)(1)(iv), (e)—the parties include in an appendix all the relevant lower-court pleadings.

MAKING A RECORD-continued

A well-made record could save you from a retrial:

- Colloquies
 - Make sure the trial court has a colloquy with the defendant if he waives:
 - The right to testify.
 - The right to allocute.
 - Mitigation. In this case, also get a proffer from the defense attorney!!
- Stipulations
 - If you stipulate—get the "why" you stipulated on the record.
 - Non-court involved agreements are good, and probably appreciated by the court, but if they are not on the record, they may haunt you in the future.
 - It will probably be 5-6 years before you or defense counsel are asked about it—will you remember then?

MAKING A RECORD-continued

- Rulings
 - Detailed, non-summary rulings **RULE!!**
 - Alternative rulings (in a motion for a new trial).
 - Properly admitted
 - Harmless
 - REMEMBER, the federal courts **MUST GIVE DEFERENCE** to state court rulings.
- Is it on the record?
 - Make sure that the court reporters are transcribing side bars.
 - No in chambers meetings without the court reporter.
- Describe physical evidence in detail, because it won't be sent to the court (e.g. the weight of an item, the size of a knife, etc.)

MAKING A RECORD—continued

- Post-trial
 - Talk to your jurors
 - There is a recent trend of defense contacting jurors in post-conviction
 - Head this off by speaking to them after trial—have your case agent or a paralegal or someone there to witness what they say
 - Move to supplement the record with the jail visitation records.
 - This could support later claims of IAC.

Recent Issues: Victim Impact Statements

- You have an affirmative duty to review victim impact statements. See *State v. Carlson*, 351 P.3d 1079, 1095, ¶ 61 n.8 (Ariz. 2015) ("In a case such as this, when the victim reads a letter or speaks from notes, the prosecutor has a duty to review the contents of the proposed presentation to help prevent introduction of statements regarding the defendant's sentence. If in doubt, the issue should be referred to the judge before the jury is permitted to hear any statement advocating a potential sentence.")

Victim Impact Statements continued

- Problem statements:
 - *Carlson*, 351 P.3d at 1095, ¶¶ 59-60
 - Statements: "[Defendant] is a dangerous man. Who will be safe around him? What place is there in our society for a man who would kill a woman like this?" "I don't believe that any of us will ever be safe if he's allowed freedom in his lifetime." "What punishment should he face? This is up to you."
 - Problem: impermissibly advocates for the death penalty

Victim Impact Statements continued

- Problem statements (continued):
 - *State v. Rose*, 297 P.3d 906, 916-19 ¶¶ 43-58 (Ariz. 2013)
 - Court had not seen such an "extensive" victim impact presentation, and, while not reversible, it came "uncomfortably close to [the] line"
 - The court did not reverse, but criticized:
 - Widow of murdered officer referring to defendant as "cop killer" and asking jury to "give the appropriate sentence" (problem: vengeful and pejorative language that approached a sentencing recommendation)
 - Playing recording of officer's "Last Call" (problem: marginally relevant)
 - Permitting victims to comment on the effect of the officer's murder on the law enforcement community (problem: inappropriate)
 - Evidence also included the officer's children wearing clothing resembling police uniforms, and photos of his survivors at his gravesite.

Recent Issues: Mitigation Rebuttal

- Mitigation rebuttal testimony—needs to rebut something or be relevant to whether the defendant should be shown leniency (test: *State v. Hampton*, 140 P.3d 950, 963, ¶ 51 (Ariz. 2006)).
- Impeach defense experts if possible, but don't humiliate or obliterate them.
- Don't pile on—even if defense does not object
 - *State v. Naranjo*, 321 P.3d 388, 411-12, ¶¶ 63-64 & n.4 (2014) (guilt phase issue—other act evidence to rebut insanity defense)
 - Court finds no fundamental error, but was "troubled" by use of defendant's prior profane and threatening statements about his daughter and a female police officer
 - Footnote reminds prosecutors to be ministers of justice, and says that the "State disregarded that responsibility by introducing inflammatory, irrelevant statements from an unredacted police report, even absent objection"

Disclosure

- When in doubt – DISCLOSE!
 - Police officer issues (even if they played a very minor role in the case)
 - Witness impeachment material
 - Lay witnesses
 - Expert witnesses
 - Other cases where a police officer, witness, or expert testified
- Make a RECORD of your disclosure/discovery
 - Discovery/disclosure receipts
 - Date-stamp documents or photos-so you have a record of EXACTLY what documents or photos were disclosed.

Precluding Evidence

- Test for precluding witnesses for discovery violations—4 prongs for court to consider (*Naranjo*, 321 P.3d at 407, ¶ 30):
 - How vital is the witness?
 - Will the witness's testimony surprise or prejudice the opposing party?
 - Did bad faith or willfulness motivate the discovery violation?
 - Any other relevant factors
- Preclusion is a last resort and should only be invoked when less severe sanctions would be inadequate (*Id.*)

Precluding Evidence continued

- Just because you can seek preclusion, does not mean that you should—it could lead to an IAC claim later and, if the precluded evidence is critical, could result in a retrial
- Continuance v. Preclusion
 - Expert witness**
 - Evidence
- Ask yourself:
 - "How much will it hurt my case if it comes in?"
 - "How important is it to the defendant's case?"
 - "Could it actually help my case?"
 - "Could I end up having to retry this case?"
- Don't fight a defendant's presentation of mitigation.

Offering Evidence

- If there is a real issue with evidence you want admitted—Ask yourself:
 - "How much do I need this evidence?"
 - "Is it cumulative to evidence I already have or to proving an element of the offense?"
- Weigh the need for the evidence v. the risk of reversal on appeal because the evidence was improperly admitted.
 - Do your own 403 balancing test
 - A trial judge agreeing with you is not the same as 5 judges on the Supreme Court.
- 404(b) evidence—make sure there is a limiting instruction given.

THE DEFENSE

- Don't comment on or off the record about the defense or the defense attorney.
- Be concerned if the defense does not seem prepared.
 - Ask questions about this on the record.
- Remember, no matter how good you think defense counsel is, or how good your working relationship is, they will be called ineffective.
- Get the defense's thought process or strategy on the record if possible.
- Keep in mind that in PCR the **STATE** is **DEFENDING THE DEFENDER!**

Conclusion

- Make a good record.
- Disclose, disclose, disclose.
- Continue, don't preclude.
- Know when enough is enough.
- Make sure the defense is doing their job.

PUBLIC RECORDS REQUESTS AND PROSECUTION

Public Records Requests?

- Expect the following Post Capital Sentencing:
 - Direct Appeal, Rule 32, Federal Habeas, AND
 - A Public Records Request for the Case File!
- A.R.S § 39-121 et al. allow anyone, including defendants and defense attorneys, to make public records requests.
- MCAO has public records requests in 9 capital cases
 - Requestors are Office of Public Advocate (3); Federal PD (3); and private defense attorneys (3).
- Police Departments likely receive similar requests!
- Public Records Requests = Post Conviction Discovery

Public Records Request Process

- Defense Attorney submits PRR to MCAO COR
 - MCAO COR orders file and scans it;
 - MCAO Attorneys review, redact, and release records;
 - MCAO does not produce a privilege log;
- Defense Attorneys Can Enforce PRR in Civil Court
 - File a civil special action that is assigned to civil trial judge;
 - MCAO Civil Services Division represents State;
 - Civil trial judges have ordered MCAO to produce privilege log in at least one capital case;
 - Private attorneys more likely to litigate public records request
- Public Records Requests = Post Conviction Discovery

Public Records Request: Examples

- State v. Gallardo
 - DEC 2011: Public Defender submits PRR to MCAO for case file;
 - MAR 2012: MCAO provides case file on 35 CD ROMs;
 - MAR 2013: PD files discovery motion for case file in PCR proceeding, AG opposes;
 - OCT 2013: MCAO provides a second set of CD ROMs to PD and PCR/Trial judge orders AG to review privileged material in MCAO case file;
 - OCT 2014: PD files another discovery motion for case file, MCAO/AG oppose;
 - JAN 2015: PCR/Trial judge orders MCAO/AG to produce privileged documents for in camera review;
 - FEB 2015: MCAO/AG provide PCR/Trial judge entire case file for in camera review;
 - MAR 2015: MCAO provides PD with another copy of case file; MCAO/AG have discovery meeting with PD;
 - APR 2015: PD subpoenas MCAO prosecutors to testify at evidentiary hearing;
 - MAY 2015: Hearing occurs, but prosecutors do not have to testify;
- Civil Cases
 - State v. Prince: Filed by defense counsel, judge ordered MCAO to produce a privilege log;
 - State v. Joseph: Filed by defense counsel, pending ruling on privilege log;
- Public Records Requests = Post Conviction Discovery

Preparing for Public Records Requests

File Closeout in Capital Cases:

- Organize case file:
 - Ensure case file contains all relevant material (police reports, motions, notes, emails, etc...)
 - Discard duplicate records (multiple copies of police reports, motions, etc...)
 - Segregate and clearly mark all privileged material (work product, victim information, etc...)
 - Segregate and clearly mark any seal orders and the sealed material;
 - Clearly identify discovery provided to trial defense counsel;
 - Scan and bates stamp entire file;

Remember:

- There will be a public records request for the case file, and possibly for your emails and personnel file;
- Assume all material in the case file (even the privileged documents) will be disclosed to multiple defense attorneys and judges over the next 20 years;
- Disclosure issues can vacate a capital sentence or conviction, and it is always better to resolve them sooner rather than later

Questions?

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